

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 19, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2014AP2278
2014AP2279**

STATE OF WISCONSIN

**Cir. Ct. Nos. 2011CV467
2011CV478**

**IN COURT OF APPEALS
DISTRICT IV**

2014AP2278:

**IN RE: ACQUISITION OF PROPERTY OF RICARDO M. GARZA AND
JULIE L. GARZA:**

RICARDO M. GARZA AND JULIE L. GARZA,

PLAINTIFFS-APPELLANTS,

V.

AMERICAN TRANSMISSION COMPANY LLC AND ATC MANAGEMENT, INC.,

DEFENDANTS-RESPONDENTS.

2014AP2279:

**AMERICAN TRANSMISSION COMPANY LLC AND ATC
MANAGEMENT, INC.,**

PLAINTIFFS-RESPONDENTS,

V.

RICARDO GARZA AND JULIE GARZA,

DEFENDANTS-APPELLANTS.

APPEALS from judgments of the circuit court for Waupaca County:
MARK J. MCGINNIS, Judge. *Reversed and causes remanded for further proceedings.*

Before Kloppenburg, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Ricardo and Julie Garza appeal summary judgments in favor of American Transmission Company, LLC (ATC). ATC brought a declaratory judgment action against the Garzas seeking declarations that ATC has an easement to clear vegetation within forty feet of the center line of a transmission line that was installed in 1995, and that the Garzas are enjoined from interfering with ATC's removal of vegetation that is located on that portion of the Garzas' property that lies within the forty-foot easement. The circuit court agreed with ATC that it has an easement to remove the vegetation on the Garzas' property and entered summary judgments in favor of ATC. For the reasons discussed below, we reverse and remand for further proceedings.

BACKGROUND

¶2 In June 1969, the Garzas' predecessors in title, Jerome and Betty Hertig, granted a transmission line easement to the Wisconsin Public Service Corporation (WPSC). The easement provides in relevant part:

[The Hertigs] hereby grant to Wisconsin Public Service Corporation ..., hereinafter called grantee, its successors or assigns, the perpetual right, privilege and easement to erect, maintain and operate an electric transmission line, comprising wood pole structures conductors and other wires, counterpoises, guy wires, braces and other usual appendages and appurtenances of such kind as said Grantee, its successors and assigns, may from time to time

determine, for transmitting electric current over and across land owned by [the Hertigs]

....

Together with the right from time to time to enter upon said premises for the purpose of erecting said line, and changing, repairing, patrolling, replacing and removing the same, and the right from time to time to clear all brush and trees within 40 feet of each side of the center line of such transmission line and the right from time to time to cut down, trim or remove such trees on said premises beyond such 40 feet as in the judgment of Grantee, its successors and assigns, may interfere with or endanger said line, and to do any and all other acts necessary in the proper erection, maintenance, safeguarding, and operation of said line.

¶3 Later that year, WPSC built a single-circuit electrical transmission line (the 1969 transmission line) that utilized wood poles to support the conductors. The 1969 transmission line was built along the centerline described in the easement, which was located on land owned by the Wisconsin Department of Transportation. In 1994, the Public Service Commission issued an order authorizing the reconstruction and replacement of several transmission lines in Wisconsin. Pursuant to that order, WPSC replaced the 1969 transmission line in 1995 with a double-circuit transmission line, with one circuit carrying the same voltage as the 1969 transmission line, and the other circuit carrying twice the voltage as that carried by the 1969 transmission line. The 1995 transmission line utilized steel poles to support the conductors, which are located generally along the centerline described in the easement. In 2001, the easement was assigned by WPSC to ATC.¹

¹ ATC was formed by the Public Service Commission of Wisconsin in 2000. ATC was created to provide high voltage transmission services to utilities and retail electric operatives.

¶4 In 1977, the Hertigs' property was subdivided into multiple parcels, one of which was purchased by the Garzas in 2004. The centerline of the electrical transmission line lies to the west of the Garzas' property; however, a small triangular strip of the Garzas' property lies within forty feet of the centerline line and, thus, within the easement.

¶5 ATC notified the Garzas that vegetation on their property within the easement needed to be trimmed or removed and scheduled tree removal on their property for August 2011. The Garzas prohibited ATC from removing all the vegetation ATC sought to remove.

¶6 In September 2011, the Garzas brought suit against ATC, alleging that the easement was invalid and that ATC had illegally cut down trees on their property, and seeking relief in the form of inverse condemnation. Before service was perfected on the Garzas' complaint, ATC filed an action against the Garzas for declaratory judgment that ATC has the right to remove vegetation on that portion of the Garzas' property that lies within the forty-foot easement and enjoining the Garzas from interfering with the removal of that vegetation. The Garzas counterclaimed against ATC's declaratory judgment action, alleging in part that ATC's easement was extinguished or did not give ATC the right to build, maintain, and operate the 1995 transmission line. The cases were consolidated by the circuit court.

¶7 Both parties moved for summary judgment. The circuit court granted summary judgment in favor of ATC, and dismissed the Garzas' claims. Relevant to these appeals, the court determined that the replacement of the wood support poles with steel poles and the change in the number of electrical circuits did not invalidate the 1969 easement, which the court stated contains language

providing WPSC, and its assignees, with the ability to change the transmission lines as needed or in response to technological advances. The court further determined that the 1969 easement remains valid and that pursuant to that easement, ATC has the authority to remove trees from the Garzas' property that is situated within the easement. Judgments were subsequently entered in favor of ATC. The Garzas appeal.

ANALYSIS

¶8 The Garzas contend that the circuit court erred in granting summary judgments in favor of ATC. The Garzas argue that ATC does not have authority under the 1969 easement, or by prescriptive easement, to remove vegetation on the Garzas property. They contend that because ATC does not have authority to remove vegetation from their property, summary judgment should have been entered in their favor. For the reasons discussed below, we agree.

¶9 We review a circuit court's grant or denial of summary judgment independently of the circuit court. *AKG Real Estate, LLC v. Kosterman*, 2006 WI 106, ¶14, 296 Wis. 2d 1, 717 N.W.2d 835. Summary judgment is appropriate when there is no disputed issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2013-14).²

¶10 These appeals require us to interpret the instrument creating the 1969 easement in order to ascertain the parties' rights. In *Konneker v. Romano*,

² All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

2010 WI 65, ¶25, 326 Wis. 2d 268, 785 N.W.2d 432 (internal citations omitted), our supreme court explained easements as follows:

An easement “is a permanent interest in another’s land, with a right to enjoy it fully and without obstruction.” The “dominant estate” enjoys the privileges granted by the easement, and the “servient estate” permits the exercise of those privileges. While the servient estate may not unreasonably interfere with the dominant estate’s right to use the easement, “[t]he use of the easement must be in accordance with and confined to the terms and purposes of the grant.”

¶11 In determining the rights of individuals under an easement, our objective is to ascertain the intent of the parties. *Id.*, ¶26. The primary source of that intent is contained within the four corners of the instrument creating the easement. *Id.* Thus, the threshold question for this court is whether the instrument is ambiguous, which is a question of law that we review independently. *Id.*, ¶23. Where the language of the instrument is unambiguous, we may not look outside the instrument’s four corners to ascertain the parties’ intent, and we determine de novo the rights of the parties under the easement. *Id.*, ¶26. Where the language of the instrument is ambiguous, meaning that it is susceptible to more than one reasonable interpretation, evidence in addition to the instrument may be introduced to demonstrate the intent behind the language. *Id.* If the language of the instrument is ambiguous, the intent behind the language presents a question of fact. *Id.*, ¶23. We will not overturn findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2).

¶12 At trial and now on appeal, the parties devote substantial argument to the issue of the 1969 easement’s continued validity in light of the installation of the 1995 transmission line. However, we conclude that the dispositive issue here is not the validity of the easement, but rather the scope of the easement. Thus, the

issue for us to determine is whether the 1969 easement permits ATC to remove vegetation from that portion of the Garzas' property that is situated within forty feet of the centerline of the transmission line.

¶13 The instrument creating the 1969 easement conveyed to WPSC and its successors or assigns:

the perpetual right, privilege and easement *to erect, maintain and operate an electric transmission line, comprising wood pole structures conductors and other wires, counterpoises, guy wires, braces and other usual appendages and appurtenances of such kind as [the Wisconsin Public Service Corporation], its successors and assigns, may from time to time determine, for transmitting electric current over and across land owned by said grantor*
....

....

Together with the right from time to time to enter upon said premises for the purpose of erecting said line, and changing, repairing, patrolling, replacing and removing the same, *and the right from time to time to clear all brush and trees within 40 feet of each side of the center line of such transmission line* and the right from time to time to cut down, trim or remove such trees on said premises beyond such 40 feet as in the judgment of [the Wisconsin Public Service Corporation], its successors and assigns, may interfere with or endanger said line (Emphasis added.)

¶14 The parties agree, as do we, that the relevant language of the instrument creating the easement is unambiguous. Accordingly, we do not look beyond the instrument's language to determine whether ATC has the right under the easement to remove vegetation from the Garzas' property that is situated within the forty-foot easement. See *Konneker*, 326 Wis. 2d 268, ¶26.

¶15 The instrument's plain language permits the construction, maintenance, and operation of a transmission line that is comprised of *wood pole*

structures. The instrument’s plain language also permits ATC, as the assignee of WPSC, the right to clear all trees and brush within forty feet of each side of the center line of “such transmission line.” In this case, “such transmission line” refers to the transmission line comprising of wood pole structures.

¶16 When the 1969 transmission line, which was comprised of wood pole structures, was replaced in 1995, the wood pole structures were replaced with *steel pole structures*. The plain language of the 1969 easement does not convey the right to clear vegetation within forty feet of a transmission line comprised of steel pole structures. Accordingly, we conclude that removal of vegetation on that portion of the Garzas’ property that is within forty feet of the 1995 transmission line is outside the scope of the 1969 easement.

¶17 ATC makes several arguments against this conclusion, none of which we find persuasive. First, ATC argues that the easement is not limited to a structure comprised of wood poles, citing the easement’s “broad grant of rights, which allows ATC to ‘determine’ the ‘kind’ of ‘pole structures, conductors and other wires ... and other usual appendages and appurtenances’ necessary to the transmission system.” However, ATC does not explain how a steel pole structure is a “kind” of wood pole structure within the meaning of the easement, such that the easement authorizes it to change “a structure comprised of wood poles” into a structure comprised of steel poles.

¶18 ATC argues that our interpretation frustrates the easement’s purposes, however, this argument is similarly unavailing. The self-evident purpose of the easement is to authorize a wood pole structure, with appropriate appurtenances. Limiting the easement to placement of wood pole structures is not inconsistent with that purpose. ATC’s argument that construction of the new steel

pole structure is reasonably necessary for the full enjoyment of the easement fails for the same reason. The easement is to allow the placement and use of a wood pole structure. If ATC needs to place a steel pole structure, then it needs a new easement to enjoy that use.

¶19 ATC argues that if it does not have the right under the 1969 easement to remove vegetation from that portion of the Garzas' property that lies within forty feet of the centerline of the 1995 transmission line, it nevertheless has the right to remove vegetation on that land because ATC has a prescriptive easement "to maintain the [1995 transmission] line in its present form and location pursuant to WIS. STAT. § 893.28(2)." We disagree.

¶20 WISCONSIN STAT. § 893.28(2) provides that the "[c]ontinuous use of rights in real estate of another for at least 10 years by a domestic corporation organized to ... transmit ... power or electric current to the public or for public purposes ... establishes the prescriptive right to continue the use."

¶21 ATC argues that the record establishes that it has a prescriptive easement for the 1995 transmission line. ATC argues that it is a domestic corporation, as defined by WIS. STAT. § 196.485; that it is organized for the sole purpose of planning, constructing, operating, maintaining and expanding transmission facilities and to provide transmission services; and that it has "continuously used the real estate of another (the [Wisconsin Department of Transportation]) to operate ... [the 1995 transmission line] in the same location" as the transmission line installed in 1969.

¶22 We will assume for the purposes of this appeal that ATC is correct that it has a prescriptive easement for the erection, maintenance, and operation of the 1995 transmission line. However, ATC has not made a showing that it also

holds a prescriptive easement for the removal of vegetation on that portion of the Garzas' property that lies within forty feet of the center line of that transmission line. In particular, ATC has not argued, nor has it directed this court to any summary judgment materials showing, that ATC continuously used (i.e. removed vegetation from) that portion of the Garzas' property that is at issue in this case for at least ten years. Accordingly, we conclude that ATC has not established that it has a prescriptive easement to remove vegetation from that portion of the Garzas' property that is in dispute.

¶23 Because ATC has neither the right under the 1969 easement, nor a prescriptive easement, to remove vegetation from the Garzas' property, we conclude that the circuit court erred in granting summary judgment in favor of ATC and in dismissing the Garzas' complaint. Accordingly, we reverse the summary judgments and remand for further proceedings.

CONCLUSION

¶24 For the reasons discussed above, we reverse and remand for further proceedings.

By the Court.—Judgments reversed and causes remanded for further proceedings.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

